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ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1155

[Docket No. ATBCB-2020-0003]

RIN 3014-AA43

Guidance Procedures

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Final rule.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (hereafter, “Access Board,” or “Board”) issues this final rule to implement an Executive order entitled “Promoting the Rule of Law Through Improved Agency Guidance Documents.” By this rule, the Access Board establishes internal, procedural requirements governing the issuance, public availability, and modification or withdrawal of Access Board guidance documents.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Christopher Kuczynski, Deputy General Counsel, U.S. Access Board, (202) 272-0042, kuczynski@access-board.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In October 2019, the President signed Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” 84 FR 55235 (Oct. 15, 2019). Section 4 of this Executive order directs Federal agencies to finalize new regulations (or update existing regulations) that provide procedures for, among other things, issuance of non-binding guidance documents, coordinated review of “significant” guidance documents by the Office of Management and Budget (OMB), and agency review of petitions by members of the public for modification or withdrawal of existing agency guidance materials.

In accordance with E.O. 13891, the Access Board promulgates this new rule, which establishes internal agency procedures with regard to the issuance, publication, and modification or withdrawal of Access Board guidance documents. All current guidance documents already in effect are posted on our website’s guidance portal, www.access-board.gov/guidance. See Notice of Guidance Documents, 85 FR 11949 (Feb. 28, 2020). Any guidance document not posted on the Agency’s guidance portal are considered to be rescinded and neither the Agency nor a party may cite, use, or rely on such a guidance except to establish historical facts.

II. Regulatory Process Matters

Administrative Procedure Act

The guidance procedures established by this final rule implement E.O. 13891 and solely address internal matters related to agency management and practices. As such, this

rule is exempt from the notice-and-comment process pursuant to the Administrative Procedures Act. See 5 U.S.C. 553(a)(2), 553(b)(3)(A).

Executive Order 12866

This final rule establishes internal rules of agency procedure only. OMB has determined that the rule is not a significant regulatory action within the meaning of Executive Order 12866.

Executive Order 13771

This final rule is not subject to Executive Order 13771 because it is a non-significant regulatory action that relates solely to “agency organization, management, or personnel.” See Executive Order 13771. 82 FR 9339 (Feb. 3, 2017); OMB, M-17-21, “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

Congressional Review Act

This final rule is not a major rule within the meaning of the Congressional Review Act. See 5 U.S.C. 801 et seq.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies to analyze regulatory options that may assist in minimizing any significant impact of a rule on small businesses and small governmental jurisdictions. See 5 U.S.C. 604, 605(b). Because this final rule relates solely to agency internal procedures and, moreover, is not subject to notice-and-comment rulemaking, the RFA is inapplicable.

Federalism (Executive Order 13132)

The Access Board has analyzed this final rule in accordance with the principles and criteria set forth in Executive Order 13132. The Board has determined that this action will not have a substantial direct effect on the States, the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

Paperwork Reduction Act

This final rule does not specify any new collections of information or recordkeeping requirements that require OMB approval under the Paperwork Reduction Act. See 44 U.S.C. 3501 et seq.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (codified at 2 U.S.C. 1531 et seq.) (“UMRA”) generally requires that Federal agencies assess the effects of their discretionary regulatory actions that may result in the expenditure of \$100 million (adjusted for inflation) or more in any one year by the private sector, or by State, local, and tribal governments in the aggregate. Because this final rule is not subject to notice-and-comment rulemaking, UMRA’s analytical requirements do not apply. See 2 U.S.C. 1532(a).

List of Subjects in 36 CFR Part 1155

Administrative practice and procedure.

For the reasons stated in the preamble, the Access Board adds 36 CFR part 1155 to read as follows:

PART 1155 – GUIDANCE PROCEDURES

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Authority: 29 U.S.C. 792; E.O. 13891, 84 FR 55235, 3 CFR, 2019 Comp., p. 371; 36

CFR 1151.3.

PART 1155 – GUIDANCE PROCEDURES

§ 1155.1 Purpose.

(a) *General.* This part implements Section 4 of Executive Order 13891 by establishing requirements and procedures for issuance, publication, and modification or

withdrawal of guidance documents of the United States Access Board (“Access Board” or “agency”).

(b) *Application.* Unless otherwise stated, the requirements and procedures set forth in this part apply to all guidance documents issued or revised by the Access Board on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

§ 1155.2 Definitions.

For the purpose of this part, the following terms have the indicated meaning:

(a) *Guidance document.* Subject to the exceptions provided in paragraph (b) of this section, a written statement of general applicability that the Access Board intends to:

(1)(i) Have future effect on the behavior of regulated parties;

(ii) Set forth agency policy on a statutory, regulatory, or technical issue; or

(iii) Interpret a statute or regulation.

(2) Guidance documents are not limited to formal, written documents, and may be set forth in other documentary formats, such as electronic, digital, audio, or video materials.

(b) *Exceptions.* The following types of guidance documents are exempt from compliance with the requirements and procedures specified in this part:

(1) Rules promulgated pursuant to notice and comment under 5 U.S.C. 553, or similar statutory provisions;

(2) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);

(3) Rules of internal organization, procedure, or practice within the Access Board, provided such rules do not alter substantive obligations for parties outside the Access Board;

(4) Access Board decisions in formal adjudications conducted pursuant to 5 U.S.C. 554, or similar statutory provisions;

(5) Internal guidance directed to Access Board personnel or other Federal agencies or officials that is not intended to have substantial future effect on the behavior of regulated parties;

(6) Internal executive branch legal advice or opinions addressed to other executive branch officials or Federal agencies;

(7) Access Board statements of specific applicability, including: advisory or legal opinions directed to particular parties about circumstance-specific questions, and correspondence with individuals or entities;

(8) Legal briefs, other court filings, or written positions taken by the Access Board or its legal counsel in administrative, legal, or enforcement proceedings;

(9) Access Board statements that do not set forth agency policy on a statutory, regulatory, or technical issue or interpretation of a statute or regulation, such as: speeches and individual presentations, editorials, media interviews, press materials, or

congressional testimony by Access Board officials that does not set forth new agency regulatory policy;

(10) Contract solicitations and awards; and

(11) Access Board policies or guidance directed solely to agency employees, contractors, or other Federal agencies that are not anticipated to have substantial future effect on the behavior of regulated parties outside of the Federal Government.

(c) *Significant guidance document.* A type of guidance document that may reasonably be anticipated to:

(1) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations or recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

§ 1155.3 Legal review by Office of General Counsel.

The Office of General Counsel is responsible for ensuring that Access Board guidance documents comply with applicable laws, regulations, and other Federal authorities, including the procedural requirements established in this part. Agency guidance documents must be reviewed and cleared before issuance or publication by the General Counsel or his or her designee, upon written delegation.

§ 1155.4 Requirements applicable to all guidance documents.

(a) *General.* Access Board guidance must be issued, published, and modified or withdrawn in compliance with this part, as well as other applicable Federal statutes, regulations, or executive branch authorities.

(b) *Requirements.* In addition to its substantive or informational content, Access Board guidance must:

(1) Comply with all relevant statutes or regulations (including any statutory deadlines for agency action, absent exigent or unforeseen circumstances);

(2) Be written in plain and understandable English;

(3) Use the term “guidance”;

(4) Include each of the following documentary elements, unless its nature or format makes inclusion impracticable (in which case, the document should conform to such element to the maximum extent feasible):

(i) Title;

(ii) Date;

- (iii) Revision number (if applicable);
- (iv) Unique document identification number;
- (v) Identity of issuing agency or component;
- (vi) Citation(s) of Federal laws, regulations, or other authorities being interpreted or applied;
- (vii) Description of target audience;
- (viii) Summary of subject matter near the top of the document; and
- (ix) A disclaimer, stating: "The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies."

§ 1155.5 Public availability of guidance documents.

(a) *General.* Subject to the exceptions provided in § 1155.2(b), all current, in-force guidance documents, including significant guidance documents, shall be made publicly available on a single, searchable web-based “guidance portal” on the Access Board website. Guidance documents posted on this portal should, to the maximum extent feasible, comply with the identification requirements specified in § 1155.4(b). The Access Board shall only cite, use, or rely on guidance documents that are listed on its guidance portal except to establish historical facts or similar archival information.

(b) *Portal requirements.* The Access Board guidance portal must include the following elements or features:

(1) A statement that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;

(2) When proposed significant guidance is open for public comment in conformance with § 1155.8, a notice informing members of the public how to submit comments or link to the appropriate electronic docket;

(3) The citation for, or link to, the procedural regulations concerning guidance documents set forth in this part; and

(4) A notice informing individuals how to submit requests for issuance, modification, or withdrawal of guidance documents, in accordance with § 1155.9.

§ 1155.6 Significance determinations.

(a) *Agency requests.* The Access Board should make an initial, informal assessment concerning the “significance” of each proposed guidance document. The Office of General Counsel shall submit the proposed guidance to the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) for a significance determination. The agency’s request shall include, at minimum, a copy of the proposed guidance document, the agency’s designation recommendation, and the bases for this recommendation.

(b) *OIRA significance determinations.* If OIRA determines that a guidance document is significant, the Access Board shall comply with the enhanced procedural

requirements specified in §§ 1155.7 and 1155.8 prior to issuance. Otherwise, the Access Board may proceed to issue the guidance document after the Office of General Counsel has determined it complies with the requirements of § 1155.4.

(c) *Emergency situations.* When an emergency, statutory deadline, judicial order, or other conditions, require the Access Board issue significant guidance more quickly than otherwise possible under the procedures established in this part, the Office of General Counsel will notify OIRA, as soon as possible, and comply with applicable clearance requirements to the maximum extent feasible.

§ 1155.7 Additional requirements applicable to significant guidance documents.

(a) *General.* Guidance documents deemed “significant” by OIRA must comply with the additional requirements specified in this section.

(b) *Additional requirements.* Significant guidance documents must:

(1) Satisfy the requirements in § 1155.4, which are applicable to all guidance documents;

(2) Be approved by the Chair of the Board, on a non-delegable basis;

(3) Be accompanied by a regulatory impact analysis for proposed guidance that OIRA has determined to be economically significant;

(4) Be submitted to OIRA for coordinated review, along with, at minimum, a summary of the proposed guidance and documentation demonstrating compliance with

applicable rulemaking requirements set forth in Executive Orders 12866, 13563, 13609, 13771, and 13777; and

(5) Comply with the notice-and-comment procedures prescribed in § 1155.8, unless the General Counsel or his or her delegee issues a written determination that these informal rulemaking procedures would be impracticable, unnecessary, or contrary to the public interest.

§ 1155.8 Notice-and-comment procedures.

The Access Board shall publish a notice of availability in the *Federal Register* with a public comment period of not less than 30 days, absent written determination by the General Counsel that a public comment period would be impracticable, unnecessary, or contrary to the public interest. After the close of the public comment period, the Access Board will also prepare a written response to any major concerns raised by commenters and make this response document publicly available on the Access Board website and/or electronic rulemaking docket (such as regulations.gov), either before the guidance is finalized or upon publication.

§ 1155.9 Petitions for modification or withdrawal.

Any person may petition the Access Board, in writing, for issuance, modification, or withdrawal of an agency guidance document. Requests should be addressed to the Office of General Counsel, describe the action(s) the requester wishes the agency to take with regard to existing or new guidance, and explain the bases for this request. Requests may be submitted by email (OGC@access-board.gov) or regular mail (Office of General Counsel, 1331 F Street, NW, Suite 1000, Washington, DC 20004). The Office of

General Counsel will review the request and respond in a timely manner, which, typically, is within 90 days of receipt.

§ 1155.10 No private right of action.

This part is solely intended to improve the internal management of the Access Board. Nothing in this part is intended to, or does, create a private right of action against the United States, its agencies or other entities, its officers or employees, or any other person. Authority to enforce compliance with this part is vested exclusively with the Board.

Dated: August 18, 2020.

Gretchen Jacobs,

Interim Executive Director.

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